No. 03-633

JUL 12 2004

In The Supreme Court of the United States

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether there is an international consensus against the execution of persons below 18 years of age at the time of the commission of the offense.

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INTEREST OF AMICI CURIAE[1]

The European Union ("EU") considers the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community. These principles are common to its 25 Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant.

The EU and its Member States share the widespread opinion of the international community of States that the execution of persons below 18 years of age at the time of their offenses violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations. Furthermore, the EU and its Member States are opposed to the death penalty in all cases and accordingly aim at its universal abolition. The abolition of the death penalty

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[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than amici and counsel for amici authored this brief in whole or in part, and no person or entity, other than amici and counsel, have made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court, jointly with this brief, pursuant to Supreme Court Rule 37.3 (a). Counsel of record acknowledges the invaluable coordination and research for this project from Anne James, Executive Director, International Justice Project and her staff. William J. Mertens acted as counsel for the EU on an earlier version of this brief.

contributes to the enhancement of human dignity and the progressive development of human rights. This view has been expressed to the Government of the United States through various general demarches and through specific demarches in cases involving, *inter alia*, the pending execution of persons under the age of 18 at the time of their offenses.[2]

The EU and its Member States pursue this policy consistently in different international fora such as the United Nations and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty.[3] The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other *amici*.

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[2] Demarches in the cases of persons under the age of 18 at the time of their offenses were transmitted in each of the following: Sean Sellars, Oklahoma, February 11, 1999; Douglas Thomas, Virginia, June 20, 1999; Steve Roach, Virginia, January 14, 2000; Gary Graham, Texas, May 17, 2000 & June 22, 2000; Glen McGinnis, Texas, January 18, 2000; Gerald Mitchell, Texas, October 3, 2001; Napoleon Beazley, Texas, July 20, 2001, August 10, 2001, August 14, 2001 & May 7, 2002; Antonio Richardson, Missouri, February 21, 2001; Alexander Williams, Georgia, February 14, 2002; Christopher Simmons, Missouri, April 17, 2002; T.J. Jones, Texas, July 23, 2002; Toronto Patterson, Texas, July 29, 2002; Kevin Stanford, Kentucky, October 7, 2002; Ronald Chris Foster, Mississippi, December 16, 2002; Scott Hain, Oklahoma, February 26, 2003. All these communications can be found on the Internet, EU Policy and Action on the Death Penalty, *at* <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases>.

[3] *See* European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1998), *at* <www.eurunion.org/legislat/deathPenalty/Guidelines.htm>.

Canada, the Council of Europe,[4] Iceland, Liechtenstein, Mexico,[5] New Zealand, Norway, and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

U.S. Constitution, Amendment 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

International Covenant on Civil and Political Rights, Art. 6(5):

> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

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[4] The Council of Europe is composed of 45 Member States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *See* Appendix A for The Council of Europe's Statement of Interest.

[5] *See* Appendix B for Mexico's Statement of Interest.

American Convention on Human Rights, Art. 4(5):

> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . .

United Nations Convention on the Rights of the Child, Art. 37(a):

> Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . .

Fourth Geneva Convention, Art. 68.4:

> [T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

Vienna Convention on the Law of Treaties, Part II, Sect. 1, Art. 18, and Sect. 2, Art. 19:

> SECTION 1. CONCLUSION OF TREATIES.
>
> Article 18
>
> Obligation not to defeat the object and purpose of a treaty prior to its entry into force
>
> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> a. It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have

> made its intention clear not to become a party to the treaty; or
>
> b. It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
>
> SECTION 2. RESERVATIONS.
>
> Article 19
>
> Formulation of reservations
>
> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> a. The reservation is prohibited by the treaty;
>
> b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

STATEMENT OF THE CASE

The EU has no independent knowledge of the circumstances of this case, but from prior court filings, understands that Christopher Simmons is on death row in the state of Missouri after being found guilty of committing murder when he was only 17 years old. The EU also understands that Christopher Simmons' age at the time of the murder is uncontested, and considers that his execution would violate widely accepted international human rights norms.

SUMMARY OF ARGUMENT

There is wide agreement within the international community against the execution of juveniles under the age of 18 at the time of their offenses. This consensus is evidenced by the practices of the overwhelming majority of nations; provisions of international law including treaties to which the United States is a party; and the positions of States before international bodies. The EU respectfully submits this brief so that the Court may take the existence of this consensus into account in its consideration of this case.

ARGUMENT

THERE IS AN INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF PERSONS BELOW THE AGE OF 18 AT THE TIME OF THE OFFENSE

The EU submits this brief in support of the virtually unanimous international consensus against the execution of persons who were under 18 years of age at the time of their offense.

In assessing whether a particular punishment violates the prohibition against cruel and unusual punishment in the

Eighth Amendment to the United States Constitution, this Court has said that it is guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). As evidence of those standards, the Court has consulted a number of sources beginning with the current opinions and attitudes of the American people, as well as the actions of State legislatures. Ultimately, it considers the proportionality of the punishment to the offense. At least when, as a threshold matter, American society seems generally set against a certain punishment, the Court has examined "the views of the international community in determining whether a punishment is cruel and unusual." *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion striking down the death penalty for children under 16) (citing *Trop v. Dulles*, 356 U.S. at 102 & n.35; *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982)).

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249, n. 21 (2002), six Justices of this Court concluded that the overwhelming disapproval of the world community is a relevant factor in determining the "social and professional consensus" against the imposition of capital punishment on mentally retarded persons. That consensus made the practice of the death penalty against such persons "truly unusual," in violation of the Eighth Amendment to the United States Constitution. *Id.* at 2249. The EU considers the argument against the execution of juvenile offenders to be analogous. The practice of other nations in not imposing capital punishment upon persons under the age of 18 at the time of the offense demonstrates a similarly overwhelming disapproval by the international community which, in this case, should be considered by the Court in discerning social and professional consensus. Even more recently, in *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003), this Court

looked to the jurisprudence of the European Court of Human Rights and other countries where the issue involved reliance on values shared by the United States "with a wider civilization."

In the 15 years since this Court's approval of the death penalty for 16 and 17 year old juvenile offenders in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the direction of U.S. practice has consistently moved away from the application of the death penalty to juveniles.[6] This trend is consistent with international practice and in harmony with a near-unanimous international norm against such executions. Among the 38 U.S. States authorizing the death penalty, 18 have expressly set a minimum age of 18 at the time of the crime as the eligibility threshold for the death penalty. In addition, the U.S. Federal Government and the U.S. Military both prohibit the execution of those under 18 years of age. Again, this trend is consistent with international practice and in harmony with the above-mentioned wide agreement within the international community against such executions. Accordingly, the EU respectfully suggests that this consensus further justifies re-examination of the application of the Cruel and Unusual Punishment Clause to the execution of a now-limited category of juvenile offenders.

A. Execution of Persons Under the Age of 18 at the Time of the Offense is Contrary to the Practice of Virtually All Nations.

Since 1990, only eight countries reportedly executed children: Iran (8), Saudi Arabia (1), Nigeria (1), the

[6] Amnesty International, *United States of America: Indecent and Internationally Illegal: The Death Penalty Against Child Offenders*, AI Index: AMR 51/143/2002, Sept. 2002, at 15-25.

Democratic Republic of Congo ("DRC") (1), Yemen (1), Pakistan (3), China (1) and the United States (19).[7]

Between the years 2001 and 2004, four nations reportedly executed juvenile offenders. Indeed, the last 14 years have seen a marked reduction in the number of nations that allow such executions. In the year 2002, only the U.S. reportedly carried out executions of juvenile offenders: Toronto Patterson, T. J. Jones and Napoleon Beazley. Each of these executions took place in Texas. In 2003, China and the U.S. were the only countries to have reportedly executed juveniles: in January 2003, Zhao Lin was executed in China and, in April 2003, Scott Hain (Oklahoma) was executed in the U.S.[8]

In 1994, Yemen removed itself from the dwindling group of nations still permitting the execution of juvenile offenders by enacting a new Penal Code that increased the minimum age for the application of the death penalty to 18 years.[9] Since enactment, there have been no reported executions of juveniles in Yemen. In 2000, the Nigerian Government

[7] Amnesty International, *Children and the Death Penalty, Executions Worldwide Since 1990*, AI Index: ACT 50/007/2002, 25 Sept. 2002, *at* 14; updated to June 6, 2004 by International Justice Project, *US Juvenile Executions Since 1976*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvStats.cfm>; International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvWorld.cfm>.

[8] International Justice Project, *US Juvenile Executions Since 1976*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvStats.cfm>; International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvWorld.cfm>.

[9] Amnesty International, *Yemen Ratification Without Implementation: the State of Human Rights in Yemen*, AI Index: MDE 31/01/97, at 34, 37 (Mar. 1997).

asserted to the United Nations Sub-Commission on Human Rights that earlier reports were incorrect and that the execution that took place in 1997 was not of a juvenile offender. It further reiterated that any juveniles convicted of capital offenses have had their sentences commuted.[10] In addition, Saudi Arabia has emphatically denied the alleged 1992 execution of a juvenile offender.[11]

Notwithstanding a declaration in December 1999 by the Minister for Human Rights that the Government of the DRC was exercising a moratorium on executions, a 14-year-old child soldier was executed on January 15, 2000, within 30 minutes of his trial by a Military Order Court.[12] However, according to the World Organization Against Torture, four juvenile offenders who subsequently were sentenced to death in the DRC military courts were granted stays. The sentences of all four were then commuted following appeals from the international community.[13]

In July 2000, Pakistan outlawed juvenile executions when it adopted the Juvenile Justice System Ordinance, signed on July 1, 2000. Nevertheless, it has been reported that Pakistan executed Ali Sher on November 3, 2001 for a crime he committed at the age of 13. President Perwez Musharrah of Pakistan subsequently commuted the death sentences of

[10] U.N. Sub-Commission on Human Rights, Summary Record of the 6th Meeting, 52nd Sess., Aug. 4, 2000, E/CN.4/Sub.2/2000/SR.6 para. 39 (2000).
[11] U.N. Commission on Human Rights, Summary Record of the 53rd meeting, 56th Sess., Apr. 17, 2000, E/CN.4/2000/SR.53, paras. 88 and 92 (2000).
[12] Amnesty International, *Democratic Republic of Congo: Killing Human Decency*, AI Index: AFR 62/07/00, May 31, 2000, at 12.
[13] World Organization Against Torture, Case COD 270401.1.CC, 31 (May 2001).

approximately 100 child offenders imposed before the death penalty for child offenders was abolished in July 2000.[14]

In common with Pakistan, the domestic law in China prohibits the execution of juveniles.[15] However, in January 2003, Zhao Lin, aged 18, was executed for an offense committed when he was 16 years old. It has been suggested that Chinese courts may not take sufficient care to determine the age of juvenile offenders,[16] which could have resulted in this aberration of domestic law.

Most recently, it has been reported that Iran executed Mohammad Mohammadzadeh on January 25, 2004 for an offense committed at the age of 17.[17] Significantly however, in December 2003, a bill to raise the minimum age for imposition of the death penalty to 18 was approved by the Iranian parliament. The bill is currently awaiting approval by the highest legislative body, the Guardian Council, in order to become law.[18]

Thus, the United States, at present, stands virtually alone among all the nations of the world in actively carrying out death sentences for offenses committed by children.

[14] Amnesty International, *Pakistan: Young offenders taken off death row*, AI Index: ASA 33/029/2001, Dec. 13, 2001.
[15] Amnesty International, *Which Countries Still Use the Death Penalty against Child Offenders?*, visited on June 21, 2004, *at* <http://www.amnestyusa.org/abolish/juveniles/countries.html>.
[16] *Id.*
[17] Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, Feb. 16, 2004, *at* <http://news.amnesty.org/mav/index/ENGPOL300062004>.
[18] *Id.*

B. International Instruments Prohibit the Execution of Juvenile Offenders.

In the view of the EU, a significant number of treaties, including a number ratified or signed by the United States, prohibit the execution of persons under the age of 18 at the time of their offenses. The bodies charged with interpretation of those treaties also support this view.

The United Nations Convention on the Rights of the Child ("CRC") is the most widely ratified human rights treaty in the world. All Member States of the United Nations barring two, some 192 nations, have ratified the CRC.[19] No other human rights instrument has achieved this level of global recognition. The U.S. and Somalia are the only two nations that have not ratified the CRC. The U.S. signed the CRC in February of 1995,[20] and Somalia signed the CRC in May of 2002, indicating its intent to ratify.[21] As stated in Article 18 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), a nation is obliged to "refrain from acts which would defeat the object and purpose of the treaty after

[19] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Convention on the Rights of the Child*, as of November 14, 2003, *at* <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>.

[20] Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: United States of America*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/815f8bc03a4089f3c1256b67006555ea?OpenDocument>.

[21] Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: Somalia*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/22b020dc61f10ba0c1256a2a0027a1c/2cf803a303bfc61ac1256b6700650a53?OpenDocument>.

signature and prior to ratification."[22] Although the United States is not a party to the Vienna Convention, the U. S. Department of State has recognised it as the authoritative guide to current treaty law and procedure.[23] This provision would therefore be taken into account when examining whether the actions of a State, which had signed but not ratified the CRC, were contrary to the object and purpose of the Treaty.

Article 37(a) of the CRC prohibits the execution of juvenile offenders. It provides that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . ." A Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 ¶ 90 (2000), notes that in all but 14 States parties to the CRC, national laws prohibit the imposition of the death penalty on persons who committed the offense when under 18 years of age.

In May of 2002, the United Nations General Assembly unanimously adopted an extensive resolution, "A World Fit For Children", in which the body declared that "we acknowledge that the Convention on the Rights of the Child, the most universally embraced human rights treaty in history . . . contain[s] a comprehensive set of international legal standards for the protection and well-being of children." The document further calls upon the Governments of all States, "in particular States in which the death penalty had not been abolished, to comply with the obligations they have assumed under relevant provisions of international human rights

[22] The Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 at 289 (1969), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

[23] The Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92nd Cong., 1st Sess. 1 (1974).

instruments, including in particular Articles 37 and 40 of the Convention on the Rights of the Child and Articles 6 and 14 of the International Covenant on Civil and Political Rights".[24]

Some 152 nations have ratified the International Covenant on Civil and Political Rights ("ICCPR").[25] Article 6(5) of the ICCPR specifically forbids the use of the death penalty against those under 18 at the time of the crime: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." The United States signed the ICCPR in 1979 and ratified it in 1992 with a reservation to Article 6(5), stating that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age," and a more general declaration that the provisions of Articles 1 through 27 of the Covenant were not self-executing. As articulated in Article 19 of the Vienna Convention, a State may, when ratifying a treaty, formulate a reservation, but the reservation must not be "incompatible with the object and purpose of the treaty."

Article 4(2) of the ICCPR states that no derogation can be made from Article 6 even in times of public emergency, thus indicating that Article 6 is seen to be inherent to the object

[24] United Nations, *Report of the Ad Hoc Committee of the Whole of the twenty-seventh special session of the General Assembly*, Supplement No. 3, A/S-27/19/Rev.1 (May 2002), at ¶¶ 4, 44.8.

[25] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties*, as of June 3, 2004, at 12, *at* <http://www.unhchr.ch/pdf/report.pdf>.

and purpose of the ICCPR. The EU notes that the United States has made no reservation to Article 4(2).

The Human Rights Committee ("HRC") is the treaty body that monitors and reports on matters relating to the ICCPR. By ratifying the ICCPR, the United States has expressly recognized the authority of the HRC.[26] A number of federal courts also have explicitly recognized the HRC's authority in matters of the ICCPR's interpretation. *See, e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC's guidance may be the "most important" component in interpreting ICCPR claims); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); *United States v. Bakeas*, 987 F. Supp. 44, 46, n.4 (D. Mass. 1997) (HRC has "ultimate authority to decide whether parties' clarifications or reservations have any effect"); *Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y 1999) (HRC interpretations as "authoritative").

In General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), the HRC states, in relevant part:

> 6. . . . [W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty.
>
> ***

[26] That recognition extends to State reporting requirements under Article 40 of the Covenant, but the U.S. has also filed a declaration recognizing the competence of the Human Rights Committee under Article 41 to hear complaints between State parties. Multilateral Treaties Deposited With the Secretary General, Status as of Dec. 31 1994, U.N. Doc. ST/LEG/SER.E/13 at 133 (1995).

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right (...) to execute children (...).

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10. . . . While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

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18. . . . The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the

reserving party without benefit of the reservation.[27]

In 1995, the HRC applied General Comment No. 24 to the first U.S. report on domestic compliance with the ICCPR and found that the U.S. reservation to Article 6(5) was incompatible with the object and purpose of the treaty. It recommended that the U.S. withdraw the reservation.[28]

With regard to the regional human rights systems, it is to be noted that the abolition of the death penalty became a pre-condition for membership of the Council of Europe. To date, 41 of the 45 Member States of the Council of Europe have abolished the death penalty, while the remaining four Member States are observing a *de facto* or *de jure* moratorium.

Forty-five Member States have signed the European Convention for the Protection of Human Rights and

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[27] The full text of General Comment No. 24 is attached to this brief as Appendix C.

[28] *See* Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg., at 14, U.N. Doc. ICCPR/C/79/Add.50 (1995). In reaction to the U.S. report on compliance, the Human Rights Committee said:

> Para. 279. The Committee is . . . particularly concerned at reservations to Article 6, paragraph 5, and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.
>
> . . .
>
> Para. 281. [The HRC] deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18. . . .

Fundamental Freedoms.[29] As of June 5, 2004, 44 Member States of the Council of Europe have signed the 6th Protocol to the above instrument concerning the Abolition of the Death Penalty.[30] In the same vein, 42 Member States of the Council of Europe have signed the recently adopted (May 2002) Protocol No. 13 to the same Convention, concerning the abolition of the death penalty under all circumstances.[31]

Article 12 of the Arab Charter on Human Rights, adopted in 1997 by the League of Arab States, also prohibits the death penalty for persons under the age of 18.[32] By the end of 2001, 26 countries had ratified the African Charter on the Rights and Welfare of the Child, [33] and, as of May 2004, 24 countries had ratified the American Convention on Human Rights,[34] both of which prohibit the death penalty for crimes committed by children.

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[29] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.: 005, as of June 21, 2004, *at* <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

[30] Council of Europe, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, CETS No.: 114, as of June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG>.

[31] Council of Europe, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, CETS No.: 187, as of June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=1&DF=&CL=ENG>.

[32] *Arab Charter on Human Rights, reprinted* in 18 Hum. Rts. L.J. 151 (1997).

[33] Amnesty International, *supra* note 6, at 84.

[34] Organization of American States, Secretariat for Legal Affairs, B-32: American Convention on Human Rights, "Pact of San Jose, Costa Rica," visited on June 21, 2004, *at* <http://www.oas.org/juridico/english/Sigs/b-32.html>.

The American Convention on Human Rights, the principal human rights treaty of the Organization of American States ("OAS"), of which the U.S. is a member, provides: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . . ."[35] The U.S. signed the agreement in 1977 with a proposed reservation limiting U.S. adherence to "the Constitution and other law of the United States."[36] However, a further human rights instrument in the Americas, the American Declaration on the Rights and Duties of Man ("American Declaration") has been interpreted on several occasions to create binding legal obligations on all OAS Member States, including the United States.[37] Applying those obligations to the U.S., the Inter-American Commission on Human Rights recently found the U.S. practice of sentencing to death juvenile offenders, under the age of 18 at the time of their offense, in violation of a peremptory, or *jus cogens* norm of international law. *Domingues v. United States*, Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, October 22, 2002. The

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[35] American Convention on Human Rights, Ch. II, art. 4, § 5, OASTS No. 36; OAS OFF Rec. OEA/SER L/V/II.23 Doc. 21 Rev. 6 (1979).

[36] *President's Message to the Senate Transmitting Four Treaties Pertaining to Human Rights*, in U.S. Ratification of the Human Rights Treaties: With or Without Reservations? 85, 105 (Richard B. Lillich ed. 1981).

[37] Advisory Opinion No. OC-10/90, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R., Ser. A, No. 10 (1989), at ¶¶ 35-45; *Roach and Pinkerton v. United States*, Inter-Am. C.H.R. 147, OEA/ser.L/V/II.71, doc. 9, rev. 1 (1987), at ¶¶ 46-49; *Garza v. United States*, Inter-Am. C.H.R. 1255, OEA/ser.L/V/II.111, doc. 20 rev. (2001), at ¶ 60; *Edwards et al. v. The Bahamas*, Report No. 48/01, Cases 12.067, 12.068, 12.086 (April 4, 2001), at ¶¶ 124-154. *See generally* Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159 (2002).

decision in *Domingues* provides an exhaustive review of the relevant international law and standards, as well as the law and practice of nations. *Id.* at ¶¶ 40-83.

As detailed in Article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm is a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[38] The Restatement (Third) of the Foreign Relations Law (1986), agrees with this standard, stating that a *jus cogens* norm is established where there is acceptance and recognition by a "large majority" of States, even if over dissent by "a very small number of states."[39]

As stated in the decision of the Inter-American Commission on Human Rights in *Domingues*, *supra*, at ¶ 85, "As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty *or by the objection of a state, persistent or otherwise*" (emphasis added).

Furthermore, in *Domingues*, *supra*, at ¶ 106, it was explicitly found that the U.S. Government could not legitimately invoke the persistent objector principle to exempt itself from the norm against the execution of juveniles.

The Inter-American Commission on Human Rights has subsequently reaffirmed its ruling in three United States

[38] *Supra*, n.22, at Art.53.

[39] Restatement (Third) of the Foreign Relations Law § 102, and Reporter's Note 6 (1986) (citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/CONF.39/11 at 471-77).

cases involving juvenile offenders: Napoleon Beazley,[40] Gary Graham[41] and Douglas Thomas.[42]

Finally, Article 68, paragraph 4, of the Fourth Geneva Convention states that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."[43] By ratifying this treaty in 1955, without reservation to that paragraph, the United States agreed that in the event of war or other armed conflict in which it may become involved, the United States will protect all civilian children in occupied countries from the death penalty.

C. International Norms and Standards Overwhelmingly Reject the Propriety of the Death Penalty for Juvenile Offenders.

International norms and standards adopted by international bodies and organisations, including the United Nations, further reflect the international consensus against the death penalty for juvenile offenders.

Resolutions by the United Nations Economic and Social Council ("ECOSOC") and the United Nations General Assembly have opposed imposition of the juvenile death

[40] *Napoleon Beazley v. United States*, Report No. 101/03, Merits Case 12.412, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.12412.htm>.

[41] *Gary Graham v. United States*, Report No. 97/03, Case No. 11.193, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.11193.htm>.

[42] *Douglas Christopher Thomas v. United States*, Report No. 100/03, Case No. 12.240, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.12240.htm>.

[43] *Convention Relative to the Protection of Civilian Persons in Time of War*, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949).

penalty for some time. ECOSOC adopted *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50, U.N. Doc. E/1984/84 (1984), which explicitly prohibit the execution of juveniles in Article 3.

The Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders opposed the execution of juvenile offenders in its Standard Minimum Rules for the Administration of Juvenile Justice, also known as "The Beijing Rules".[44] In 1985, the United Nations General Assembly adopted The Beijing Rules by consensus.[45]

The United Nations Commission on Human Rights, at its 53rd Session in 1997, passed a resolution calling on States to consider abolishing the death penalty altogether and urging those States retaining such a punishment not to impose it for crimes committed by persons under the age of 18 at the time of the offense.[46] Every year thereafter, the Commission has passed a similar resolution.[47] In 2001, a Commission

[44] The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly Resolution 40/33 of 29 November 1985 ("The Beijing Rules"). Article 17.2 of The Beijing Rules, which sets out the Guiding Principles in Adjudication and Disposition, states: "Capital punishment shall not be imposed for any crime committed by juveniles."

[45] G.A. RES 40/33, Annex, 40 U.N. GAOR Supp. (No 53) at 207, U.N. Doc. A/40/53 (1985).

[46] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 53d Sess., U.N. Doc. E/CN.4/RES/1997/12 (Apr. 3 1997).

[47] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 54th Sess. Resolution 1998/8, U.N. Doc. E/CN.4/RES/1998/8 (1998); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess. Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess. Resolution 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Commission on Human Rights, *The Question of the Death*

resolution articulating the prohibition of the juvenile death penalty as a separate issue passed by consensus without vote. This resolution requests that Governments comply with the mandates of Article 37 of the CRC and Article 6(5) of the ICCPR. A similar resolution was adopted by consensus in 2002, by a vote on the relevant paragraph in 2003, and most recently reaffirmed in 2004.[48]

Since 1982, the United Nations Commission on Human Rights has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, whose mandate has included review of those countries that still apply the death penalty. Over a decade ago, in 1991, the Special Rapporteur called on the United States to eliminate the death penalty for

Penalty, 57th Sess. Resolution 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004). Voting on each of these resolutions included opposition and abstentions, and the U.S. voted against the resolution in each year in which it was a member of the Commission.

[48] *See* U.N. Commission on Human Rights, *Rights of the Child*, 57th Sess., Resolution 2001/75, U.N. Doc. E/CN.4/RES/2001/75, ¶ 28(a) (2001); U.N. Commission on Human Rights, *Rights of the Child*, 58th Sess., Resolution 2002/92, U.N. Doc. E/CN.4/RES/2002/92, ¶ 31 (2002); U.N. Commission on Human Rights, *Rights of the Child*, 59th Sess., Resolution 2003/86, U.N. Doc. E/CN.4/RES/2003/86, ¶ 35(a) (2003); U.N. Commission on Human Rights, *Rights of the Child*, 60th Sess., Resolution 2004/48, U.N. Doc. E/CN.4/RES/2004/48, ¶ 35 (a) (2004). The position adopted in the above resolutions is further supported by additional resolutions. *See* e.g. U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 58th Sess. Resolution 2002/47, U.N. Doc. E/CN.4/RES/2002/47, ¶ 19 (2002); U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 60th Sess. Resolution 2004/43, U.N. Doc. E/CN.4/RES/2004/43, ¶ 11 (2004).

juvenile offenders.[49] Each annual report from the Special Rapporteur since 1992 has raised issues concerning the execution of children in the United States and/or called for the elimination of capital punishment under those circumstances.[50] After a special mission to the United States,

[49] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1991/36 (1991), ¶¶ 514-515.

[50] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1992/30 (1992), ¶¶ 577-578; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1993/46 (1992), ¶¶ 50, 52, 625, 679; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1994/7 (1993), ¶¶ 620, 624, 630, 685, 687; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1995/61 (1994), ¶¶ 325, 327, 373, 380; U.N. General Assembly, *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/51/457 (1996), ¶¶ 50, 85, 115, 143; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1997/60 (1996), ¶¶ 90, 116; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1998/68 (1997), ¶ 61, ¶¶ 91, 92 and Recommendation 1.1; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1999/39 (1999), ¶¶ 36, 82; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2000/3 (2000), ¶¶ 68, 73, 97; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2001/9 (2001), ¶¶ 65, 78, 119; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2002/74 (2002), ¶¶ 83, 102, 104, 149; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2004/7 (2004), ¶ 96.

the only one conducted in this country, the Special Rapporteur was particularly critical of U.S. practices in executing juvenile offenders, concluding that the practice was prohibited by international law and calling for its discontinuance. UN Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, E/CN.4/1998/68/Add.3 (1998), at ¶¶ 49, 145 and 156(b).

Furthermore, the United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In 1999, the United States was identified as one of six nations that had executed juvenile offenders since 1990. By the Sub-Commission's accounting, the United States was responsible for 10 of the 19 executions during that time period. The Sub-Commission condemned the imposition of the death penalty on those who were under 18 at the time of their offense and called on all States, including the United States, that still executed children to end that practice.[51] One year later, the Sub-Commission confirmed "that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law."[52]

The United Nations Human Rights Committee has expressed the view that the execution of juvenile offenders violates customary international law. United Nations Human Rights

[51] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999).

[52] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

Committee, General Comment No. 24 (52) Relating to Reservations, at ¶ 8.

In the view of the EU, the international documents cited above, in particular the rapid and near-universal acceptance of the CRC, dispel any doubt that there is wide agreement amongst States against the execution of persons below the age of 18. Whatever uncertainty may have existed in 1989, at the time of this Court's decision in *Stanford v. Kentucky*, it is now clear that throughout the western hemisphere and the rest of the world, there is an international consensus amongst nations against the execution of persons under the age of 18 at the time of the offense.

CONCLUSION

The arguments provided in the present Brief reveal the existence of an international consensus against the execution of persons who were below 18 years of age at the time of the offense. The U.S. position on the execution of juvenile offenders is out of step with the international community, which presents both legal and diplomatic issues. Harold Hongju Koh was U.S. Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001. Upon his return to the faculty at Yale Law School, Professor Koh reflected on the importance of "telling the truth" in U.S. foreign policy. He concluded that "we need to tell the truth about those areas in which our national standards, and especially the standards of our several states, now fall below international human rights standards. Perhaps the prime area among these has been this country's administration of the death penalty against juveniles and retarded persons. . . . I can testify that these are no longer minor diplomatic irritants. Important meetings between America and its allies are increasingly consumed with answering official protests

against the death penalty. I have little doubt that America's continuation of the practice has undermined our claim to moral leadership in international human rights . . . ."[53]

In light of relevant international norms, the EU and its Member States, and Canada, the Council of Europe, Iceland, Liechtenstein, Mexico, New Zealand, Norway and Switzerland, respectfully support the position of Christopher Simmons, which seeks to strike down the imposition of the death penalty for all juvenile offenders under 18 years of age at the time of their offenses.

Respectfully submitted,

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[53] Harold Hongju Koh, *A United States Foreign Policy for the 21st Century*, 46 St. Louis U. L.J. 293, 309-310 (2002).

APPENDIX A

STATEMENT OF INTEREST
THE COUNCIL OF EUROPE

The Council of Europe, an international organisation composed of 45 European States, fully concurs with the opinions and arguments submitted by the European Union. The Council of Europe has taken the firm position that everyone's right to life is a basic value and that the abolition of the death penalty is essential to the protection of this right and for the full recognition of the inherent dignity of all human beings. It is of the opinion that there exists an international consensus against the execution of persons who were below 18 years of age at the time of the offence.

APPENDIX B

STATEMENT OF INTEREST THE GOVERNMENT OF MEXICO

Of the seventy-three juvenile offenders currently incarcerated on death rows across the United States, three are Mexican nationals. Both Tonatihu Aguilar Saucedo, who was sixteen at the time of the offense for which he received the death penalty, and Martín Raúl Fong Soto, who was seventeen, were sentenced to death in Arizona. Osvaldo Regalado Soriano was sentenced to death in Texas for a crime committed when he was seventeen years old.

Mexico's interest in this case is twofold. First, Mexico shares the opinion of the European Union that the application of the death penalty to juvenile offenders violates established norms of international law, and seeks to express its opinion on that subject as a member of the international community. As a member of the Organization of American States, Mexico takes particular note of the decision by the Inter-American Commission on Human Rights in *Domingues v. United States*, in which the Commission found that the execution of juvenile offenders violates established norms of international customary law. Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, October 22, 2002. Mexico fully endorses the position of the Commission that the execution of juvenile offenders violates a norm of *jus cogens*, and is thus impermissible under contemporary human rights standards.

Second, Mexico has a vital stake in protecting the rights of Mr. Aguilar Saucedo, Mr. Fong Soto, and Mr. Regalado Soriano.

APPENDIX C

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24 (52)

General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).[1]

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties. Is it important for States Parties to know exactly what obligations they, and other States Parties, have in fact undertaken. And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative

[1] Adopted by the Committee at its 1382nd meeting (fifty-second session) on 2 November 1994.

declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States Parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States Parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a States's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.[2] Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument.

[2] Article 2(1) (d). Vienna Convention on the Law of Treaties 1969.

Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance.[3] It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific

[3] Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2(1) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot

be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples.[4] While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions

[4] Reservations have been entered to both Article 6 and Article 7, but not in terms which reserve a right to torture or arbitrary to deprive of life.

of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognise the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional

Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14 The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts

occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty.[5] It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon State parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to inform the Secretary General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare.

[5] The competence of the Committee in respect of this extended obligation is provided for under Article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary General of the beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the *Reservations to the Genocide Convention Case* (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the

absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a

task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the

presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdrawn reservations.